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Court : Mumbai

Decided On : Apr-01-1998

Reported in : 1998BomCR(Cri)842

Judge : Ashok Desai and; Vishnu Sahai, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 21, 23, 29, 30, 14, 42, 50, 53 and 67; [Customs Act, 1962](#) - Sections 135(1); [Evidence Act, 1872](#) - Sections 3, 17, 25, 26, 27, 59, 61 and 114; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 31

Appeal No. : Criminal Appeal No. 675 of 1994 in N.D.P.S. SPL. Case No. 727 of 1990

Appellant : John Ohuma Ogmekwe and Another

Respondent : intelligence Officer Narcotic Control Bureau and Another

Advocate for Def. : R.M. Agarwal, ;D.T. Palekar and ;P.S. Thakur, Advs., ;Mrs. J.S. Pawar, A.P.P.

Advocate for Pet/Ap. : G.G. Lalla and ;Anil G. Lalla, Advs., instructed by; Lalla & Lalla, ;S.R. Borulkar, Amicus Curie

Judgement :

ORDER

Vishnu Sahai, J.

1. Through this appeal the appellants have challenged the judgment and order dated 18th October 1994 passed by the Special Judge, Greater Bombay, in N.D.P.S. Special Case No. 727 of 1990, whereby they have been convicted and sentenced in the manner stated hereinafter :

i) Under section 21 read with section 8(c) of the N.D.P.S. Act, 1985, to suffer R.I. for Ten years and to pay a fine of Rs. 1,00,000/- (Rupees one lakh), in default to suffer further R.I. for two years.

ii) Under section 29 read with section 8(c) of the N.D.P.S. Act, 1985, to suffer R.I. for Ten years and to pay a fine of Rs. 1,00,000/- (Rupees one lakh), in default to suffer further R.I. 2 years.

iii) Under section 30 read with section 23 and 8(c) of the N.D.P.S Act, 1985; (but awarding no separate sentence) and

iv) Under section 135(1)(a) read with section 135(1)(ii) of the Customs Act, 1962. (but awarding no separate sentence).

The substantive sentences of the appellants were ordered to run concurrently.

2. In short the prosecution case runs as under :

2-A. On 23-3-1990 at about 6.15 p.m. Sidram M. Dhange - P.W. 1, who at the said time was working as Intelligence Officer in the Narcotic Control Bureau, Bombay, received intelligence that the appellants were likely to travel by Ethiopian Airlines Flight on 24-3-1990, and were likely to smuggled heroin concealed in children cardboard puzzles, in their hand baggages. Accordingly he prepared the intelligence note, Exhibit 9, put the same before the Deputy Director Mr. R.N. Kakar, who signed the same and planned out the strategy for nabbing the appellants.

Thereafter, Sidram Dhange along with the Intelligence Officer Vilas Doshi and some others at about 4 a.m. reached Departure Module-II at Sahar International Airport, Bombay.

Sidram Dhange saw the Ethiopian Airlines passengers manifest and confirmed serial Nos. 63 and 92 of the passengers manifest were bearing the names of the appellants John and Victor. At about 5.30 a.m. he saw two Nigerians near the Customs counter and they produced their passports to the Customs Officer who put his initials and rubber stamp on their boarding passes. At that time he came to know that the said Nigerians were the appellants. They were carrying shoulder bags of black colour as hand bags. He asked them to wait near the Customs counter and went to call two persons as panchas. 3 to 4 minutes later he came near the Customs counter along with the panchas who were members of staff of Air India. He told the panchas that he had intercepted the two appellants on the basis of the intelligence that they were carrying narcotic drugs in their hand baggages. In the presence of the panchas he demanded from the appellants their passports, tickets, boarding passes etc. and found that on the boarding passes at Serial Nos. 63 and 92, the names of the appellant John and Victor, respectively, were written. He asked the appellants whether they were carrying any drugs with them and they replied in the negative.

Thereafter he asked the 1st appellant John to open the shoulder bag. In it were found 14 pieces of cardboard children puzzles. Since they were slightly thick it was suspected that something had been concealed. Accordingly when the layers of the puzzles were separated 14 polythene bags were found and the total weight of powder found in them was 1 kg. 830 grams.

Thereafter he asked appellant Victor to open his shoulder bag and like John in card board puzzles 10 polythene bags were found concealed. The total weight of powder found in them was 1 kg. 280 grams.

The powder recovered from each of the appellants was poured in separate bags which were sealed and signed by the panchas and the appellants.

Sidram Dhangé has stated that prior to searching the appellants he had asked them whether they wanted to be searched in the presence of a Magistrate or a Gazetted Officer, to which they replied in the negative. Sidram Dhangé also prepared the panchanama of the seizure.

2-B. After effecting recovery from the appellants Sidram Dhangé and others, along with the appellants, came to the Narcotic Control Bureau Office at Ballard Pier, the same day.

The same day summons were served on the appellants under section 67 of the N.D.P.S. Act and their statements were recorded. Since the said statements were confessional statements we are mentioning, in some detail, the facts mentioned therein. The statements were recorded on 2 dates viz. 24-3-1990 and 25-3-1990. In their statements appellants John and Victor stated that although they had studied upto Primary VI and Primary III, respectively, they could read and write 'English' very well. A Nigerian lady Alhaja had asked them to smuggle narcotic drugs. They had undertaken the task for monetary reasons and came to India on 16-3-1990. They were staying in Hotel Milan International, Room No. 214, Santacruz (W), Bombay. They were handed over heroin on the night of 22-3-1990 by Alhaja, who had come in their room along with an Indian and while trying to smuggle the said heroin they were intercepted by officers of the Narcotic Control Bureau.

3. During the course of investigation Sidram Dhangé, P.W. 1, sent sample of the powder recovered from the appellants for testing to New Customs House Laboratory, Ballard Pier, Bombay. In due course the report of the Deputy Chief Chemist, New Customs House, Ballard Pier, Bombay, Exhibit 16, was received and the report revealed that heroin was detected in the sample.

On 31-3-1990 S.M. Dhangé forwarded the said two sample packets to the Forensic Science Laboratory, Kalina, Bombay and the report of the said laboratory revealed that heroin (diacetylmorphine) was detected in the samples.

4. After completing the investigation S.M. Dhangé placed the papers before the sanctioning authority viz. Collector of Customs, Airport, Bombay, who accorded

the necessary sanction. Thereafter the complaint was filed against the appellants.

In the trial Court the appellants were charged on the counts mentioned in para 1. They denied the said charges and pleaded not guilty.

During trial in all the prosecution examined 7 witnesses; three of them viz. S.M. Dange, Vilas Doshi and Ratnakar Puranik, P.Ws. 1, 3, and 6, respectively, were examined as witnesses of fact. In defence no witness was. examined.

The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated above.

Hence this appeal.

5. We have heard Mr. G.G. Lalla with Mr. Anil G. Lalla for appellants, Mr. R.M. Agarwal with Mr. D.T. Palekar and Mr. P.S. Thakur, for respondent No. 1. Mrs. J.S. Pawar, A.P.P. for respondent No.2 and Mr. S.R. Borulkar, who acceded to our request to act as Amicus Curie. We have also perused the depositions of the prosecution witnesses; the statements the appellants recorded under section 67 of the N.D.P.S. Act and under section 31 Cr.P.C.; the material exhibits tendered and proved by the prosecution; and the impugned judgement. After reflecting over the matter we are of the judgement that this appeal deserves to be allowed,

6. Mr. G.G. Lalla for the appellants strenuously urged that inasmuch as, there has been a infraction of the mandatory provisions contained in section 50 of the N.D.P.S. Act, the trial of the appellants is vitiated. He urged that it would be extremely unsafe accept the uncorroborated testimony of Sidram Dhange, P.W. 1, who for the first time state in the trial Court that prior to search he had enquired from the appellants whether they wanted to be searched before a Magistrate or a Gazetted Officer to which they replied in the negative. He urged that in the contemporaneous documents, like the panchanama of seizure,, Exhibit 10, seizure report, Exhibit 11 and papers sent for sanction, Exhibit 44, there is no mention of the fact that the appellants were apprised whether they wanted to be searched before a Magistrate or a Gazetted Officer. He further urged that neither of the other two witnesses of seizure viz. Vilas Doshi and Ratnakar Puranik, P.W. 3 and

6 respectively, stated that it was enquired from the appellants whether they wanted to be searched before a Magistrate or a Gazetted Officer.

7. Mr. Lalla, learned Counsel for the appellants, invited our attention to the decision of the Apex Court, reported in : (1995) 11 LLJ 832 SC , in the case of T.P. Razak and another v. State of Kerala, where in paragraphs 6 and 7, the Apex Court observed thus:

'6. As regards compliance with the requirements of section 50 of the Act there is only the evidence of P.W. 4 who has deposed in the Court that before the appellant was searched he had asked the appellant whether he is to be taken before a Gazetted Officer or a Magistrate for conducting the search and that the appellant replied that it was not necessary. This fact is, however, not mentioned in the F.I.R.. Ex.P.7 as well as in the Seizure Mahazar, Ex.P.1. P.W.1., the other witness of the search, also does not support the said version of P.W. 4. The trial Judge did not consider it necessary to assess the evidence since he was of the view that it was not necessary to comply with the provisions of section 50 of the Act. The High Court has also proceeded on the basis that the provisions of section 50 were directory and non-compliance was not fatal to the prosecution case.

7. Having regard to the fact that the F.I.R. and Seizure Mahazar do not mention about the appellant having been asked before the search was conducted as to whether he would like to be produced before a Gazetted Officer or a Magistrate and the further fact that P.W.1, the other independent witness also does not state about this we are of the view that the prosecution has failed to establish that there was compliance with the provisions of sections 50 of the Act before conducting the search of the appellant. In view of the non-compliance with the mandatory provisions of section 50 of the Act no reliance can be placed on the alleged search of the person of the appellant and the alleged recovery of four small packets containing 370 mg. of brown sugar from his possession. The conviction and the sentence imposed on the appellant cannot, therefore, be upheld and has to be set aside.'

8. Mr. S.R. Borulkar, Amicus Curie repudiating Mr. Lalla's submission urged that there has been no infraction of the right of the appellants contained in section 50

of the N.D.P.S. Act because the evidence of Sidram Dhange, P.W. 1, shows that prior to searching the appellants he had enquired from them whether they wanted to be searched before a Magistrate or a Gazetted Officer. In this connection Mr. Borulkar invited our attention to the observations contained in paragraph 5 of the Apex Court Judgement, reported in 1995 (2) Crimes 182, rendered in the case of Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat. Mr. Borulkar invited our attention to the following lines contained in the said paragraph:

'5. . . . There is no room for such presumption because the possession of illicit articles under the N.D.P.S. Act has to be satisfactorily established before the Court. The fact of seizure thereof after a search has to be proved. When evidence of the search is given all that transpired in its connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the Court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the N.D.P.S. Act was not established.'

Mr. Borulkar urged that the said passage shows that if evidence in respect of compliance of section 50 is furnished in Court it would be sufficient compliance of the said provision. Mr. Borulkar also placed reliance on the decision of the Apex Court in : 1996 CriLJ1698 (para 5) rendered in the case of Anil @ Andya Sadashiv Nandoskar, to press home his submission that the evidence of an officer of Narcotic Control Bureau should not be viewed with suspicion. The said case was under TADAA. In para 5 the Supreme Court observed thus:

'5. ... There is, however, no rule of law that the evidence of police officials has to be discarded or that it suffers from some inherent infirmity. Prudence, however, requires that the evidence of the police officials, who are interested in the outcome of the result of the case, needs to be carefully scrutinized and independently appreciated. The police officials do not suffer from any disability to give evidence and the mere fact that they are police officials does not by itself give rise to any

doubt about their creditworthiness.'

9. We have given our anxious consideration to the rival contentions canvassed by Mr. Lalla and Mr. Borulkar. We regret that we do not find any merit in the contention of Mr. Borulkar.

In the decision reported in 1995(2) Crimes 182, (supra), the issue was whether a presumption under section 114(a) of the Indian Evidence Act could be raised that the appellants had been informed of their right to be searched before a Magistrate or a Gazetted Officer. It was in this connection that in para 5 the Apex Court observed that in the absence of evidence of the communication of the right to be searched under section 50 of the N.D.P.S- Act, no such inference could be raised and the compliance of the said provision had to be proved through evidence. We cannot read the said authority to mean that if there is an explanation for the first time of the communication of the right in the evidence of the officer in the Court, the provision had been adhered to.

So far as the decision contained in : 1996 CriLJ1698 (supra) is concerned the observations of the Apex Court were in a case of T.A.D.A., in relation to appreciation of evidence of police witnesses.

10. The issue in the present case is not only that of veracity of Sidram Change but also whether would it be safe to accept the uncorroborated statement of Sidram Dhange in respect of compliance of section 50 of the N.D.P.S. Act. In our view, the ratio of the Apex Court in the decision of : (1995)IILLJ832SC , (supra) with all force applied to the present case. If paragraphs 6 and 7 of the said decision are to be perused they clearly show that it would not be safe to accept the uncorroborated testimony of the officer concerned.

10-A. We wish to emphasise that the rationales for seeking corroboration from contemporaneous documents like recovery panchanama. seizure report, papers sent for sanction etc. and from ocular testimony is to eliminate the danger of such an explanation creeping in, as an after thought in the statement of the officer. Again the object of plurality of evidence in the trial Court in respect of the communication of the right contained in section 50 is an extra caution on the part

of the Court whether the accused/appellant has really been apprised of the right contained in section 50. Such a caution on the part of the Court is necessitated by the fact that the minimum punishment under section 21 read with 8(c) and section 29 read with 8(c) of the N.D.P.S. Act is R.I. for ten years and a fine of Rs. 1,00,000/-. 10-B. For the said reasons in our view, the right of the appellants to be searched before a Magistrate, as contemplated by section 50 of the N.D.RS. Act, 1985 has been breached. 11. Mr. Lalla, learned Counsel for the appellants, strenuously urged that once the right contained in section 50 of the N.D.RS. Act, 1985 has been breached, the entire trial would be vitiated in view of the observations contained in para 26(5) of the decision reported in : 1994 CriLJ3702 State of Punjab v. Balbir Singh, paragraph 26(5) of the said decision reads thus:

'26(5) on prior information, the empowered officer or authorised officer while acting under sections 41(2) or 42 should comply with the provisions of section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non compliance of section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.'

Mr. Lalla also invited our attention to the observations of the Apex Court in paragraph 5 in 1995(2) SCALE page 77, (supra) wherein the ratio laid down in : 1994 CriLJ3702 has been affirmed.

12. Mr. R.M. Agarwal. learned Counsel for respondent No.1 strenuously repudiated to the correctness of the said submission of Mr. Lalla in view of the decision of the Apex Court reported in : 1996 CriLJ1354 State of H.P. v. Prithi Chand and another, and 1995(4) Crimes 765, State of Punjab v. Jasbir Singh and others, and a Division Bench of this Court reported in 1997 (IV) L.J. 853, Yinusa Cerualoje and another v. R.N. Kakkar and another. Mr. Agrawal urged that the ratio of the said decisions is that if the search is illegal the trial would not be vitiated because the

only consideration to be borne in mind on the issue of admissibility of evidence is the question of its relevancy. He urged that in case there is other evidence sufficient to show that the appellants were guilty on the counts on which they have been convicted by the trial Court, their conviction can still be affirmed. In this connection Mr. Agarwal made a special reference to the observations contained in paragraphs 4, 5, 7 and 14 of the decision of the Apex Court in : 1996 CriLJ1354 (supra).

He urged that in paragraphs 4 the Apex Court observed thus:

'The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground.' In paragraph 5 the Apex Court observed thus: 'It would be seen that the organized traffic in contraband generates deleterious effect on (he national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. Inspite of illegal search properly seized, on the basis of said search, it still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial'

In paragraph 7 the Apex Court observed thus:

'It would thus be sailed Jaw that every deviation from (he details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.'

The relevant portion in paragraph 14 of the said decision reads thus:

The evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of the contraband under the Act. It is founded in panchanama to seize the contraband from the possession of the suspect/ accused. Though the search may be illegal but the evidence collected, i.e., panchanama etc., nonetheless would be admissible at the trial.'

In 1995(4) Crimes page 765 Mr. R.M. Agarwal invited our attention to the following lines:

'However, the evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated. Each case is to be considered on its own back drop.'

The said decisions were relied upon in a Division Bench decision of our Court reported in 1997 IV L.J. 853 (supra). In paragraph 40 while accepting the arguments of Mr. R.M. Agarwal, who incidentally happened to be Counsel for respondent No. 1 in the said case also, the Division Bench observed thus:

'40..... It is clear from the above discussion of the entire case law that the argument of the learned Special Public Prosecutor deserves to be accepted. The issue raised before us that in view of the latter judgments of the Supreme Court, the violation of the mandatory provisions of section 50 does not render ipso facto the evidence collected during search in violation of section 50 of N.D.P.S. Act inadmissible and does not vitiate the entire trial and therefore in such cases if there is some other evidence, the Court will have to apply its mind to the facts and circumstances of each case and will have to consider that evidence and if after that the Court is satisfied that the accused was found in possession of narcotic drug or committed an offence under provision of Chapter V of N.D.P.S. Act, then there is no illegality in basing conviction on such other reliable evidence.'

12-A. In view of the decision cited by Mr. R.M. Agarwal we feel that Mr. Lalla's contention that in case there is a violation of section 50 of the N.D.P.S. Act, the entire trial would be vitiated cannot be accepted.

13. The question is whether the other evidence relied upon by the prosecution is sufficient to bring home the guilt of the appellants? The mainstay of that evidence are the statements of the appellants recorded under section 67 of the N.D.P.S. Act which are in the form of confessions.

Mr. R.M. Agarwal, learned Counsel for the respondent No. 1 urged that inasmuch as Vilas Doshi, P.W. 3, the officer of the Narcotic Control Bureau, who recorded the said statements, was not a Police Officer, the said confessional statements would be admissible and not be hit by section 25 of the Indian Evidence Act, which makes a confession to a Police Officer inadmissible in evidence. We find merit in his contention. In this connection Mr. Agrawal pointed out a plethora of authorities where in the Apex Court has laid down that 'Officers acting under Special statutes are not Police Officers and the provisions of Chapter XII of Cr.P.C. bearing caption, 'Information to the Police and their powers to Investigate', would not be applicable to them. To eschew prolixly, we are referring to only one decision viz. reported in : 1991 CriLJ97 Raj Kumar Karwal v. Union of India and others, a perusal of which vindicates the correctness of the contention of Mr. R.M. Agarwal. In the said decision the question was whether the officers of Department of Revenue Intelligence, invested with powers of an officer in charge of a police station under section 53 of the N.D.P.S. Act were 'Police Officers' within the meaning of section 25 of the Evidence Act? Apex Court after considering a large number of authorities came to the conclusion that they were not 'Police Officers' within the meaning of section 25 of the Evidence Act and confessions made to them would not be hit by section 25 of the Evidence Act. In the said decision the Apex Court also held that Chapter XII of Cr.P.C. would not be applicable to them.

14. We now propose examining the confessional statements of the appellants recorded under section 67 of the N.D.P.S. Act. While setting out the prosecution story in para 2-B we have mentioned the gist of the confessions and hence we are not adverting to the details contained in them.

Mr. Lalla, learned Counsel for the appellants strenuously urged that in the first place there is intrinsic evidence to indicate that the said statements of the appellants were not voluntary in nature. In order to bring home his submission Mr. Lalla pointed out that the language in both the statements in material particulars is identical. He pointed out that in the confession of appellants pertaining to the recovery of contraband starting from 'Today i.e. 24-3-1990, ...as mentioned in panchanama' the language is identical save for the amount of recovery of contraband and the number of bags in which it was concealed. Again Mr. Lalla pointed out that the paragraph, following the above paragraphs in both the confessional statements, starting from 'I was aware about the concealment of heroin in the cardboard:....., too is in identical language.

Again Mr. Lalla pointed out that both the appellants stated at the fag end of their statements recorded on 24-3-1990 as follows:

'Now it is very late in the night, I feel sleepy and tired. I will give my rest of the statement to you on 24-3-90 i.e. tomorrow.'

He further pointed out that when the remaining portion of their statements was recorded on 25-3-1990, both of them again stated thus:

'Again I appear before you to give my further statement. I have taken a good sleep, food and water was provided to me. I feel fresh now.'

Mr. Lalla also pointed out that the endorsement of the appellants dated 24-3-1990 and 25-3-1990, after their statements were recorded, is also worded in identical terms. The said endorsements read thus:

'Statement running into pages 1 to 4 has been given by me voluntarily. No force or coercion was made. I have gone through the statement and is recorded as per my say and is my true statement.

Sd/-

24-3-90.'

'Statement running into pages 1-2 has been given by me voluntarily. No force or coercion was made. I have gone through the statement and is recorded as per my say and is my true statement.

Sd/-

25-3-90.'

15. Mr. Lalla's contention is that it would be preposterous to accept that if the confessional statements of both the accused were recorded separately, as was sought to be urged by the prosecution, the language in material particulars would be identical. He urged that this shows that the defence of the appellants that they were beaten and thereafter their signatures were taken on blank pieces of paper and thereafter the alleged confessional statements were written by the officers appears to be correct.

16. Mr. R.M. Agarwal, learned Counsel for the respondent No.1 strenuously urged that the practice of Narcotic Control Bureau authorities is to take down the gist of the statement given by the accused and then write the statement in their own words. He urged that on account of this practice, in material particulars the confessional statements were identical in nature. We regret that we cannot accede to Mr. Agarwal's contention.

In this connection it would be pertinent to refer to paragraphs 8 to 10 of the statement of Mr. Vilas Joshi, P.W. 3, who recorded the statements of the appellants under section 67 of the N.D.P.S. Act. In the said paragraphs he has stated that he had recorded the statements of the appellants on the basis of the answers given by them in the narrative form. It is also mentioned therein that after the statements were recorded the appellants made an endorsement to the effect that they were recorded as per their say. If the statements of the appellants were recorded as per their say then it becomes impossible to accept that in both of them language would have been identical in material particulars.

16-A. In such a situation we have no hesitation in accepting the submission of Mr. Lalla that the statements of appellants under section 67 of the N.D.P.S. Act were

not voluntary and once we take that view no value can be attached to them.

17. We wish to emphasise that statements under section 67 of the N.D.P.S. Act are used as confessional statements and on their basis alone a conviction can be recorded/sustained. That being so it is impossible to accept the contention of Mr. Agarwal that it is permissible for the officers of Narcotic Control Bureau to write down the gist of what an accused has stated and then fashion his statement in his own words. The reason is that there is always the danger that the officer can give a subtle incriminating colour to the statement.

18. Mr. Agarwal cited some authorities before us but none of them stipulates that a confessional statement can be accepted even if it is not voluntary. Hence we are not referring to them. Again we may mention that Mr. Agarwal could place no authority before us wherein it has been expressly mentioned by the Supreme Court or the High Court that it is permissible for an officer to first note down the substance of the statement of the accused and thereafter record the statement under section 67 of the N.D.P.S. Act in his own language.

19. We may also mention that the appellants retracted from their confessional statements on 23-4-1990. The Supreme Court in the decision reported in : 1997(90)ELT241(SC) in the case of K.I. Pavunny v. Assistant Collector H.Q., Central Excise Collectorate, Cochin, paragraph 21, in substance observed that the condition precedent for acceptance of a retracted confession is that the confession should be voluntary in nature and the burden to show that it was not voluntary is on the accused. The relevant part of para 21 reads thus:

'21. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in Bhagwan Singh v. State of Punjab : 1952 CriLJ1131 If the Court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the Court for ordering conviction.'

We have already given our reasons for holding as to why the confessional statement of the appellants recorded under section 67 of the N.D.P.S. Act was not voluntary. To repeat, since it was not voluntary it cannot be accepted.

20. Much hue and cry was made by Mr. R.M. Agarwal on the issue that the retraction by the appellants was belated and with the oblique motive of escaping from guilt. In this connection Mr. Agarwal pointed out that prior to 23-4-1990 the appellants were produced in the Court of the Magistrate on two other dates i.e. on 26-3-1990 and 9-4-1990. He urged that had the retraction been genuine it would have been made on the said dates. We regret that we cannot accede to Mr. Agarwal's contention. Exhibit 13 is the note put up by the Investigating Officer to Deputy Director, Narcotic Control Bureau, to the effect that on 26-3-1990, the accused were brought from Azad Maidan Police Station and produced before the C.M.M. no P.P. was engaged, there was no lawyer from the defence side and consequently the Magistrate was pleased to grant 14 days remand, in respect of both the accused, with the direction that they be produced on 9-4-1990. Exhibit 13 shows that on 9-4-1990, reported that both the accused attended the Sessions Court, no P.P. was engaged, one Mr. Malegaonkar appeared for the accused and requested for extra copy of panchanama which, Court directed the department to give and the accused were remanded to judicial custody till 23-4-1990.

A perusal of Exhibit 13 would show that if the appellants did not retract their confessional statement on 26-3-1990 and 9-4-1990 it was perfectly understandable. On the first date they did not have a lawyer. On the second date though they had a lawyer, he had no papers. If in these circumstances the appellants retracted their confessional statement on 23-4-1990, their retraction cannot be faulted as an after thought.

In this connection it would be pertinent to refer to a Division Bench decision of this Court rendered on 24th September 1997 in Criminal Appeal No, 204 of 1995, in the case of Mrs. Ndukwe Onuohe v. The Assistant Collector of Customs, reported at 1998 Bom.C.R.(Cri.) 575 To the said decision one of us, Vishnu Sahai, J., was a party and therein the confession made by the appellant was retracted after 2 months and the Division Bench did not hold the retraction to be belated.

21. In this connection we would be failing in our fairness if we do not refer to the decision of the Apex Court, cited by R.M. Agarwal, reported in A.I.R. 1997 S.C.W. 2507 in the case of Shirjeet Singh v. Union of India, to show that the confessional statements in the case before us were retracted by the appellants belatedly. In the said case confession was retracted within the 6 days and the Supreme Court did not accept the retraction. The question whether retraction in a given case is made at the earliest is a question of fact and not one of law. It would all depend on the facts of a given case. In Shirjeet Singh's case (supra) in view of the peculiar facts, the Supreme Court held that retraction after 6 days was belated. In the case before us we feel that retraction on 23-4-1990, i.e. after 29 days was not belated.

In this connection it would also be necessary to refer to the observations of the Apex Court in the decision reported in A.I.R. 1996 S.C.W. 4020, Union of India and others v. Dhanwanti Devi and others, wherein in paragraph 10 the Apex Court observed thus:

'Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents.'

22. Before parting with the question of belated retraction of confessional statements we wish to emphasise that no rule of thumb having universal application to all situations prescribing the time limit wherein confessional statement should be retracted can be laid down. There may be cases where there is some delay in the retraction of confessional statements but since a cogent explanation is forthcoming from accused the belated retraction would be accepted by courts. On the converse there may be cases wherein the retraction has been made in a very short time, as in Shirjeet Singh's case (supra), but if the Court feels on the facts of the case that it was possible to make the retraction earlier and no reason for not making it earlier has been furnished by the accused the retraction would not be accepted.

Thus in the final analysis it is the explanation for the belated retraction and not the time lag after which the retraction has been made, which is crucial.

23. In our view for the said reasons the statements of the appellants recorded under section 67 of the N.D.P.S. Act have to be excluded in determining the guilt of the appellants. Once they are excluded, there is precious little evidence against the appellants.

The residual evidence is:-

(a) The Ethiopian Airlines manifest shows that at Serial No. 63 and 92 the names of appellants John and Victor, respectively, were entered.

(b) The intelligence information at Exhibit 9 shows that two Nigerians viz. John Ohuma Ogmekwe, and Victor Oheqozie Ughelu, (appellants) were likely to travel by Ethiopian Airlines Flight No. 24390 and were likely to smuggle heroin in their hand bags concealed in children cardboard puzzles, and

(c) Panchanama of the seizure, shows that recovery of contraband was made from the hand bags of the respective appellants.

We may mention that so far as the recovery panchanama is concerned it would only be relevant to the limited extent of factum of recovery. The Supreme Court in the decision reported in : 1996 CriLJ1354 State of H.P. v. Prithi Chand and another, in para 14 has observed thus: 'Even if search is found to be in violation of law what weight should be given to the evidence collected is yet another question to be gone into.'

24. In our view, the said circumstances at the most would only create a strong suspicion against the appellants. But as Gajendragadkar, J., as he then was, put it, in the time-honoured way in para 9, in the decision reported in : 1957 CriLJ1014 Sarwan Singh v. State of Punjab, 'suspicions howsoever strong, cannot take the place of proof.'

For the said reasons we find it would be difficult to sustain the conviction of the appellants.

26. Consequently, we allow this appeal, set aside the convictions and sentences of the appellants on the counts on which they have been found guilty by the learned trial Judge and acquit them thereunder. In case they have paid the fine it shall be refunded to them.

The appellants are in jail. They be released forthwith unless wanted in some other case.

Before parting with the judgment we would like to place on record our appreciation (or the assistance rendered by the learned Counsel for the parties, as well as Mr. S.R. Borulkar, amicus curie, in the disposal of this appeal.

27. Appeal allowed.

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